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LAW, INDUSTRY, AND POST-WAR ADJUSTMENTS

A NEW PROVINCE FOR LAW AND ORDER

READERS of the HARVARD LAW REVIEW need no reminder of the contributions of Mr. Justice Higgins on the subject of "A New Province for Law and Order." The value of those contributions is recognized by judges of Australian state industrial courts. These courts, although limited to adjudication in intrastate matters, possess within their respective geographical areas a less restricted jurisdiction and far greater powers than the Commonwealth Court of Conciliation and Arbitration. For example, the South Australian Industrial Arbitration Court has an original, an appellate, a civil and a criminal jurisdiction. Further, its process has been greatly assisted by determinations of industrial (or wages) boards constituted for particular industries. The boards include representatives of employers and employees, and an independent chairman. When the Arbitration Court was first constituted, the assertion was made that the court would be deluged by appeals from determinations of industrial (or wages) boards. It was said that the employees would get all they could on the board, and would then appeal to the court on the chance of getting something more. The prediction has been falsified. At most, not more than one in twenty determinations has ever come before the court for consideration on appeal. Several explanations may be suggested. In the first place, the court endeavors to prevent industrial disputes from arising or developing. It keeps in close touch with employers and employees, who have ready access to

a judge in chambers by way of deputations, conferences, etc. In the second place, when an industrial dispute is definitely before the court, whether the court is sitting in its original or its appellate jurisdiction, the practice of the court has been to hold a preliminary sitting with a view to constituting the parties an informal tribunal for the purpose of coming to some agreement among themselves. At such preliminary sittings, the presiding judge may make suggestions as to what modifications should be made at the outset in the claims of either party. If an agreement between the parties is arrived at, the agreement is only made an award of the court after judicial consideration of its terms. Otherwise, "consent awards" might be out of harmony with the general principles upon which the court acts in making an award, if they did not amount in substance to a conspiracy between employers and employees in a particular industry to exploit the general public. In the third place, should no agreement be arrived at, and the dispute come before the court for formal hearing, ordinary judicial process applies, with the accompaniment of the engagement (not inevitable but certainly prudent) of learned counsel. In the fourth place, when the court delivers a judgment, it does so with a view to stating principles clearly, and also to stating the precise grounds or reasons upon which those principles are based. The result of a sustained pursuance of this policy has been the development of a large body of doctrine for the purpose of rationalizing the operation of the Rule of Law in the sphere of industrial relations. Industrial boards have this body of doctrine to guide them when making their determinations. In other words, the boards both assist the court and are assisted by it. Parties, not within the ambit of any particular industrial board, are usually able to form a fairly accurate forecast as to what the decision of the court would be if the case were to come before the court by way of litigious process. The general result may be expressed by saying that there has been a minimum of industrial friction and a maximum of industrial harmony. There has also been more local autonomy than is possible in the case of the Commonwealth Court which is unassisted by any commonwealth industrial boards. Progress in the extension of the Rule of Law to industrial relations represents, to a remarkable degree, a combination of democratic and aristocratic elements.

The Present Situation

Past achievement is no guarantee of future success. In fact, the system of compulsory arbitration in industrial matters is now being blamed, not only for alleged sins of commission or omission, but for many ills with which it has but a slight connection, or none at all. Several factors during the last twelve months have tended to develop class friction. (1) The Report of a Commonwealth Basic Wage Commission, constituted to inquire and report as to the cost of living (for a man, wife, and three children), and composed of representatives of employers and employees presided over by Mr. A. B. Piddington, K.C., has indicated a wage for adult males of sums varying in the capital cities of the different states, but averaging about £5.14.6 a week. The chairman, in a memorandum to the Right Hon. the Prime Minister, conceded in effect that Australian industries could not pay so high a rate of wage as a bed-rock wage. He suggested a flat basic rate of £4 a week, to be supplemented by a public maternity bonus system of 12*s.* each a week for each dependent child. Notwithstanding the memorandum just referred to, and notwithstanding an adverse report by the Commonwealth Statistician as to the wages which Australian industries would bear, there has been a persistent agitation on the part of wage earners to induce the various industrial courts throughout Australia to adopt the findings of the Commonwealth Basic Wage Commission as a bed-rock living wage for all adult males. The courts have refused to concede the claim. The disappointment among wage earners has been acute. How acute, may be imagined from the fact that most industrial courts in Australia had purported to provide a living wage likewise estimated on the basis of the needs of a worker with a wife and three children to support.[1] (2) Although the value of compulsory arbitration in Australia has been greatly impaired by the dual control of commonwealth and state courts (which has existed without any demarcation of jurisdiction, and without any appellate machinery for coördinating the awards of commonwealth and state courts), the evils of dual jurisdiction have been brought very much to the fore in the last twelve months for several reasons. One reason is a decision

[1] *Cf.* The Living Wage (Printing Trades) Case, 3 S. A. I. R. 215, 252–262 (1920).

of the Commonwealth High Court, which has held that state instrumentalities are amenable to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. Another reason has been a divergence of view as to hours per week and the method of estimating marginal differences for skilled workers. The general practice in Australia in the past has been to prescribe a forty-eight hour week, and to add to the basic wage the preëxisting customary marginal difference for skilled laborers. (In a world of rising prices it seemed desirable to avoid the evil of an excessive wages bill; and it also seemed more important to secure to the underdog a living wage than to award to the skilled worker a proportional margin as distinguished from a margin simply taken as a lump sum.) Some recent decisions of the commonwealth court have involved important departures. They display a tendency towards a forty-four hour week and the adoption of the principle of proportional margins in assessing the wages of skilled labor. Hence further dissonances between the commonwealth and most state courts. (3) In Australia, as in America, world prices have called for adjustments in nominal wages. From May, 1914, to September, 1920, wages had risen about fifty-four per cent. The rise would probably have been much greater but for the fact that in Australia, where wages have been fixed generally by public authorities, and where employees generally had come to look upon public authorities as affording fairer criteria of wage justice than would be afforded either by the unrestricted operations of demand and supply in the labor market or by the results of collective bargaining, the rise in wages has not been so violent as in many other countries. Now that prices are descending, the difficulties of adjusting wages and prices may not be so formidable. They are, however, serious. So far as South Australia is concerned, the need is recognized, subject to conditions, in recent declarations of the local Board of Industry which is now entrusted with the duty of estimating the living wage. The board consists (in addition to the President of the Industrial Arbitration Court) of representatives of employers and employees. The board, after public inquiry into the adult male living wage, declared a wage of £3.19.6 a week (to replace a living wage declared about twelve months earlier by the Industrial Court of £3.15.0 a week). The declaration evoked much hostility on the part of both employers and employees. Undeterred by public

criticism, the board proceeded to conduct an inquiry as to the adult female living wage. In a report, dated August 11, 1921, the board made a declaration from which the following extract may be quoted:

"At the outset, the Board desires to state that it has acted on certain assumptions which, though amplified or implicit in its recent declaration as to the living wage for adult males, are also relevant for the purposes of the present report:—

"1. That, while the need for public and private economy is equally evident and urgent, the State of South Australia is not quite so hopelessly bankrupt in resources of material, or of mind, or of will, as to warrant the Board of Industry in declaring as a standard living wage for unskilled workers generally a sum inadequate to supply what may be regarded as the bare necessaries of life in a supposedly civilized society.

"2. That there is no impropriety in a belief that a sane economy should be sought through increased efficiency on the part of either employees or of employers, or of both, in the complex mechanism of production rather than through wages so low as to menace the health of the working population, to depress purchasing power in the local market, and to give a legal sanction to the creation or growth of a malnutritioned and discontented proletariat. Further, that the employers and employees of this State, speaking generally, are not so devoid of intelligence as to fail to realize the importance of a more effective co-operation in the processes of production.

"3. That the 'normal and reasonable needs' of the wage earner as referred to in the statutory definition of 'living wage' are not to be ascertained by reference to what may be deemed a possible scale of wages in industries passing through a period of abnormal depression due to world-wide influences.

"4. That, with respect to industries of the kind just referred to, the State Industrial Court will adhere to its frequently reiterated policy of bringing parties together in order that they may discuss the desirability of carrying on for the time being, and if so, the question of ways and means by agreement of the parties.

"5. That although a previously declared living wage during some time that it has been in operation may have become ineffectual to maintain the standard of normal and reasonable needs owing to a rapid increase in the cost of living due to world-wide causes, the duty of the Board as indicated by the Industrial Code is simply to declare a living wage for the future on such evidence as it has before it.

"6. That for the purpose of such declaration, while actually current

prices at a particular moment of time are relevant, average prices extending over at least a quarterly period should in general have a *prima facie* preference whether prices appear to be likely to ascend or descend in the near future.

"7. That the subject of the expediency of admitting of more frequent adjustments when prices are unstable is one for the consideration of Parliament, especially in view of the statement in the recent declaration of the Board that elasticity of adjustment in times of descending world prices is desirable in the interests of employers, employees, and the general community.

"8. That the question whether a prior estimate of a living wage should be reaffirmed or varied should not be answered without some reference to the date at which, and the general scope of the evidence upon which, the prior estimate was given.

"9. That increases or reductions in wages in other parts of the world, whilst relevant even in an investigation with respect to the living wage, must be viewed in relation to the industries in which, and the circumstances under which, such increases or reductions have been made. [In the *Labor Gazette*, June, 1921, prepared and edited at the office of the Ministry of Labor, London, many illustrations of both increases and decreases, but mostly of decreases, are given. For example, as regards decreases, 'Iron and steel manufacture — Fitters, turners, electricians, blacksmiths, and patternmakers employed on maintenance work at blast-furnaces (members of the Amalgamated Engineers' Union): — Decrease, under sliding scale of 60 per cent. on standard rate, leaving wages 215 per cent. above standard. Rate after change — 41s. 6d. per week, plus 215 percent.']

"10. That the duty of the Board is to interpret 'normal and reasonable needs' by reference to the evidence before it, and to form its own conclusion, even though (as in the case of the recent declaration of the Board with regard to the living wage for adult males) such conclusions may mean a lower wage than is enforced both by other State Industrial tribunals in Australia, and by the Commonwealth Court of Conciliation and Arbitration (to which last-mentioned Court both public and private employees of this State have a right of access).

"11. That, while the national production and income are relevant for the purpose of considering what wage may be considered a living wage, the duty of the Board in respect to women workers is to apply the standard of needs as distinct from the standard of the relative value of the work of men and women employees respectively.

"12. That, in the interpretation of the needs of the unskilled woman worker, the sum implicit in the declaration of the living wage for adult

males for the maintenance of the woman who works in the home as wife and mother, though not conclusive, is yet relevant for consideration.

"While the Board hesitates to state assumptions of which most may seem to be mere truisms, the statement seems desirable for two reasons. In the first place, if the assumptions are not in accord with facts, or with the legislative intent, or with the public welfare, the error can be corrected by legislative enactment. In the second place, there appears to exist a curious illusion that when prices fall a pre-existing nominal wage should be reduced, irrespective of the time at which the nominal wage was declared, and irrespective of the general scope of the evidence upon which that nominal wage was declared."

The foregoing extract illustrates some of the difficulties of the process of adjustment during a post-war period. The average employee naturally does not like to see nominal wages reduced. Many employers, on the other hand, would reduce wages straight away, irrespective of the date at which such nominal wages were fixed. The psychological influences at work are illustrated by a recent and prolonged controversy in the State of South Australia with respect to copper-mining operations. An industrial agreement between employers and employees had been made during a period of high prices. When the price of metals fell materially, the employers alleged that it was impossible for them to continue to carry on under the scheme of wages previously agreed to. On the other hand, the employees, most of whom were members of a very large union extending throughout Australia, elected to treat the case as a test case. They alleged a conspiracy of employers throughout Australia to beat down wages. They maintained, as matters of principle, that they could not give way without prejudicing employees elsewhere, and that in any case, if the company should incur some loss in continuing operations, such loss ought to be balanced against profits made in the preceding years when the prices of metals were high. For several months my learned colleague, Mr. Deputy President Webb, made endeavors to secure a settlement. Ultimately his efforts were successful. The men went back to work, under materially reduced wages, by agreement of parties, and without any award of the court. The apparent optimism of the Commonwealth Basic Wage Commission, the embarrassment under which employers labor through the existence of dual jurisdictions, and the difficulties of adjusting wages in

times of trade depression or falling prices, have combined to put a severe test upon the systems of compulsory arbitration now in force in Australia. At the imperious summons of realities, multitudinous questions arise for consideration. Has too much been attempted? Will a system of public regulation of industrial conditions work under conditions of falling prices, etc., etc.?

The Need for Reorientation

In a judgment which I gave in June, 1921, in *The Trading Bank Clerks Case*,[2] I reviewed the whole industrial position. I remarked:

"(1) Recent legislation has greatly increased the responsibilities of the Court and the ambit of those amenable to its jurisdiction. The fact has to be viewed in relation to what may be called the problem of national solvency, in view of the access which Government employees now have to the Industrial Court. (2) The present case is the first in which I have been called upon to decide whether a claim properly before the Court should be dismissed on the grounds that '*in the public interest further proceedings by the Court are not necessary or desirable.*' (3) The application for a dismissal of the claim is made at a time when catastrophic conditions, world wide, are calling for adjustments in prices and wages and a reorientation with respect to the functions and even the value of public institutions for the regulation of the conditions of employment. No one can take up his morning's paper without finding from day to day some new and perplexing problem which presents itself for solution. One is irresistibly compelled to ask what is the duty of Industrial Courts which have to face the questions of how best to protect employers from unfair competition, and employees from exploitation."[3]

As the judgment occupies forty-four pages, I limit myself in the present article to a brief statement of its general tenor. The present drift in Australia is undoubtedly towards a class war. A large proportion of employers are so confident of their "economic strength" and of the embarrassments which result from circumstances already stated, that they would like to get back to *laissez-faire*. A large proportion of employees will be satisfied with nothing less than Marxian Socialism. The general object of my declaratory judgment in *The Trading Bank Clerks Case* was to indi-

[2] 4 S. A. I. R. 181.

[3] *Ibid.*, 184–185.

cate a way between the Scylla of excessive public regulation and the Charybdis of *laissez-faire*.

Diagnosis

Naturally, the first essential is a clear and reasonably comprehensive diagnosis of existing industrial ills. From the point of view of symptoms, it is obviously unnecessary to-day to dwell on the forms and results of industrial unrest, the friction, worry, and insensate dissipation of energy — a general inefficiency in the working of the economic machine which, though more apparent and menacing since the war, was becoming evident long before the war began. In order to determine in what ways industrial courts may extend the Rule of Law to industry without doing more harm than good, we must proceed from symptoms to causes. Modern industrial unrest is a phase of, and in many respects is indistinguishable from, social unrest — a disturbance in the mental equilibrium of citizens due to such causes as new and undigested knowledge, new wealth divorced from a sense of responsibility, and the multiplication of new pleasures, of which the enjoyment is ill distributed, often abused, and seldom brought into harmony with a reasoned scheme of individual life. New knowledge, new wealth, and the multiplication of pleasures, are phases of human progress; but the process of adjustment of the minds of men and women to-day to the new conditions and new responsibilities of human life has been most conspicuous in creating uncertainty and discontent. It will be apparent that the operation of the causes just stated involves many problems with which an industrial court is not concerned. But in so far as the causes contribute to industrial instability, their existence has to be recognized if a court is to avoid the fatal danger of tinkering with symptoms.

Three specific causes of industrial unrest are more obviously related to the work of an industrial court. The first is the war, with its aftermath. The second is the mechanical character of much of the work which has to be done in an age of machinery. The third specific cause, though existing before the war, has been very greatly emphasized as a result of the war. I allude to the coëxistence of political democracy with industrial autocracy. The apparent assumption is that, although every citizen has intelligence enough to choose and criticize those who shall govern the country,

he has not intelligence enough, or he has not good will enough, to be entrusted with a voice in the direction of a trade, industry, or business, save within the modest limits suggested by legislation for the regulation of industrial conditions. The average laborer, though he has a voice in the destiny of the nation, has come to regard himself in industry as little more than a cog in a merciless mechanism for grinding out profits. Whether this view be sound or not I need not now discuss. It is enough for immediate purposes to insist upon the felt disharmony between ideas accepted in citizenship — ideas which involve self-determination and a conscious community of interest and responsibility — and the ideas reflected in the organization of industrial enterprises.

The "Wants of the Worker"

The subject of diagnosis may be approached from the point of view of those "wants of the worker," the non-satisfaction of which is most apparently provocative of industrial discontent: (1) A higher standard of living, or at least a greater purchasing power. (2) A closer approximation to a just proportion between services rendered and reward or remuneration received. (3) A reasonable security of employment. (4) An interest in the work. With respect to the last mentioned, the average employee compares unfavorably with the craftsman of the middle ages, or the "professional" classes of our own time. The chief problem of our day is to discover means to give to the worker a real interest in his work, whether such interest has its source in the character of the work done, or in a communal control, or in a community of interest and responsibility in results achieved, or again, in some variation or combination of these. Since we live in an age of machinery it is idle to ignore the need for other forms of realization of self-interest than have in time past proved sufficient. The problem of industrial life to-day is not to destroy machinery, but to adapt the mechanism of production in its wide sense to the insistent demand of men for some form of self-expression. The most apparent form of self-expression is the consciousness that the success or failure of a particular trade, manufacture, or process is in some way or other as much the concern of the employee as the employer.

Industrial Courts and Boards

Neither wages boards nor industrial courts have proved, or ever can prove, a complete solution of the problem of industrial unrest. Yet it is worth while to consider both their value and their limitations. Though they are in the nature of a sequel to the Factory Acts of the last century, they have been freely criticized. While many employees urge that they are attempts to solve a problem which can only be solved by radical measures of a more or less revolutionary character, many employers contend that the institutions, though "theoretically" admirable, have proved in practice to be meddlesome, irritating, and conducive to inefficiency. A few extracts from recent expressions of opinion in the Australian press deserve quotation, if only to show a failure to realize the purposes and the inevitable limitations of the institutions criticized. "Industrial courts were constituted to prevent strikes. Why have they not done so?" "Why have industrial courts failed to do justice to the toilers?" "Why have industrial courts been so consistently unfair to employers?" "Industrial courts were constituted to put an end to the industrial strife and unrest of our time; but they have augmented these evils." It should be apparent that the criticisms, if not partisan, at least display a failure to realize the complexus of the causes of social and industrial unrest. Adam put the blame on Eve. "The old Adam survives." An ever increasing censoriousness is one of the prevailing traits of our time. One half of the criticism of modern democratic institutions might be summarized in a single question, "Why does not Parliament make men virtuous?" True, the question is not put in this terse form. But the fact remains that man, being human, possesses, among other qualities, the very human quality of "shifting the blame." An existing order or institution, being in the nature of things an abstraction, and so incapable of suing for slander, is most convenient for the purpose.

I have referred to some criticisms of industrial courts in an article on "Industrial Courts in Australia."[4] Therein[5] I pointed out the value of wages boards, and the need to supplement their action by a judicial tribunal which, instead of acting

[4] Jour. Comparative Legis., p. 169 (October, 1920).

[5] *Ibid.*, p. 171.

in a sectional way, should view industry at large. I referred [6] to the fact that publicly unregulated freedom of competition would justify conditions reminiscent of "The Song of the Shirt," and suggested [7] the psychological advantage of having a judicial authority, to which industrialists might appeal, both as an alternative to industrial anarchy, and as a protection to average employers from unfair competition. In the same article [8] I discussed the question whether, making allowance for inevitable adverse conditions of long standing or recent growth, industrial courts in Australia have been as successful as might have been reasonably anticipated. I enlarged [9] upon the need in a country like Australia, with a single fiscal system, for an industrial appellate tribunal to harmonize the awards of commonwealth and state courts. Later [10] I referred to the contention that industrial courts are a legalization of class warfare, and pointed out that such courts do not create the warfare, in so far as it exists, but are essentially a means for coping with it in accordance with reasoned principles. I referred [11] to the moral value and effect of industrial awards. I also touched [12] upon those agencies of social betterment, which are complementary to the judicial regulation of industry.

The above references cover too wide a field for immediate discussion. But I desire to refer to certain subjects:

(1) *The failure to suggest workable alternatives to the schemes of industrial regulation by public authority.* — There are, of course, suggestions for a radical change in the present economic order. But such suggestions do not appear to admit of adoption in the present or near future. I had this in mind when I said in a judgment in *The Living Wage (Printing Trades) Case:*[13]

"Every gain or loss in this world has to be regarded in the light of alternatives. In industrial matters, the alternative has been, and remains, either justice in accordance with reasoned principles, or the turbulence of an industrial strife, and the rule of might. Both employers and employed have to gain in the long run by the adoption of the former of these alternatives. Speaking of South Australia, I have no hesitation in saying that those who deny that the activities of this

[6] JOUR. COMPARATIVE LEGIS., p. 172 (October, 1920).
[7] *Ibid.*, p. 178. [8] *Ibid.*, p. 180. [9] *Ibid.*, p. 181.
[10] *Ibid.*, p. 187. [11] *Ibid.*, p. 185. [12] *Ibid.*, pp. 170, 187, 188.
[13] 3 S. A. I. R. 215, 225–226 (1920).

Court have exercised on the whole a steadying influence upon industry in this State must be blind to the sum total of facts. They are unable to see the wood for the trees. They are so obsessed by this or that case of 'industrial burglary' that they cannot see the industry of the community as a whole."

(2) *The futility of relying on "the free play of economic forces."* — It ought not to be necessary in these days to say anything in refutation of those who talk about what they describe as the "inexorable law of supply and demand." But, as Leslie Stephen remarked, exploded fallacies live long after their brains have been knocked out. In the judgment just referred to I remarked:[14]

"While economic tendency cannot be ignored, the 'free play' is apt to grind to powder. The operation of economic forces can, within limits, be controlled, qualified, and in a measure directed. The history of civilization is a long record in illustration. . . . I cannot refrain from adding that it is strange to me that the 'unrestricted operation of economic forces' should be urged at a time when we have come to realize, though imperfectly, the need for international regulation in order to prevent the desolation of war. In the life of each nation, no less than in that of the society of nations, the need for socially regulated order exists, and that need extends as much to what are called industrial matters as to what are called civil and criminal matters. The sooner the fact is recognized by employers and employees alike, the sooner shall we reach a better order."

More recent events in the world of trade and commerce suggest a further remark. At the very moment that employers invoke unrestricted supply and demand as a criterion of wage justice, many of them are deeply concerned to prevent, by artificial means, supply and demand from operating in respect to the price of commodities or services. I have not in mind oppressive corners and combines, seeking every occasion to exploit. It is sufficient for my purposes to point out combinations of suppliers who seek governmental aid, with the object of tiding over periods when a temporary surplus of supply might leave producers at the mercy of speculators on the market. The object is legitimate, but not more so than the public regulation of industrial conditions. The fact that there are necessary limits to wise action in both cases need not

[14] 3 S. A. I. R, p. 229.

blind us to the inconsistency of those who would entrust conditions of employment to unrestricted supply and demand, while appealing for public control to prevent a *débâcle* in the price of commodities or services.

(3) *The limitation of the value of collective bargaining.* — It is a common cry, expressed in different camps according to circumstances, "Let employers and employees agree among themselves." At the very opening of this article I have tried to show how large is the field for agreement between employers and employees. But one has to face the fact that sometimes disputants will not agree even on fundamentals; that sometimes they may agree on standards which cause discontent and dislocation in other industries; that at times employers may be strong enough to impose intolerable conditions on the workers; or again, that the employees, as a result of a scarcity of labor, strong organization, or strategic position, may be able to impose unfair conditions on employers. It is idle to speak of such possibilities as "academic." They actualize in every-day experience. The practice in the South Australian Industrial Arbitration Court has been already outlined. My immediate point is that the settlement of industrial disputes in the ways indicated is something different from collective bargaining as ordinarily understood. It is a settlement arrived at after mediation and suggestion by a public official, and inevitably subject to an anticipation of what the award of the court would be if the case were proceeded with by way of a formal hearing, conducted with due regard to principles expressed in reasoned judgments of the court in previous cases.

(4) *The public regulation of industry during the war and post-war periods.* — The experience of the public regulation of industry by boards or courts during recent years goes to show, not that such regulation is valueless, but that its value is qualified by time and circumstance. Dean Inge has expressed the present situation, as regards England, in graphic if impressionistic terms:

"We are no longer united as a nation; we are a mass of helpless individuals, plundered by gangs of conspirators, honeycombed with treason . . . Many persons appear to have made fortunes out of the calamities of their country, and to wish their neighbors to know that they have made them. Organized labor has thrown off the mask, and is frankly setting up a new privileged class, blackmailing the public by their monopoly

of one or other of the necessaries of civilized life. We all know how we are being treated by the miner and the bricklayer; nothing more scandalous, and nothing as ruinous, was ever done by the captains of industry in the days before the Factory Acts."

To what extent either America or Australia is better than England I leave to others to say. I do, however, express the opinion that the public regulation of industrial conditions has greatly mitigated the evils of industrial strife in Australia during a trying period. We suffer, of course, from defects in the public machinery. Those defects, however, are remediable. But the most perfect public machinery will assure neither industrial peace nor industrial efficiency unless such machinery is supported by public opinion and supplemented by private agencies. Further, the proved possibilities of coöperation between employer and employed have a direct bearing upon the terms in which, or the conditions upon which, awards of this court should be made. "The principle of private justice, as embodied in such an institution as the vendetta," writes Dr. Marett, "deserves full credit at the hands of the historical jurist for the part it has played in stimulating the State lawyer to invent an improved substitute for it." [15] If my preceding argument be sound, the industrial strife of our time provides a stimulus to state action; but the "improved substitute" calls for hard thinking and judicious action on the part of both the legislative and the judicial organs of the modern community. Specifically, so far as industrial courts are concerned, the term "judicious action" has a negative as well as a positive implication. Too much as well as too little may be done. I conceive of "the harmonious code for the governance of industrial relations" as limited in scope, just as law in general is limited to the governance of human relations in so far as they are proper for enforcement in legal tribunals. It has never been the ideal of the jurist to cover the whole field of morality. It ought not to be the ideal of industrial courts to cover the whole field of industrial relations. The fact is so obvious that I should not refer to it but for a quite natural though indefensible disposition, which has been displayed by large classes of employers and employees alike, to expect industrial courts to draw up a complete bill of the conditions of employment in a particular industry.

[15] JOUR. COMPARATIVE LEGIS., p. 39 (January 1921).

I have heard an employer say, under examination: "If our employees are to have access to tribunals, then, of course, the present concessions which they enjoy must be abolished." It would be just as logical for a citizen to say: "If my neighbor is to have the right of access to legal tribunals, then my moral obligations are defined, and he must not expect me to recognize any other obligations than those imposed by law." We have outgrown this attitude so far as law in general is concerned, if, indeed, such an attitude ever existed. But the novelty of industrial arbitration has served temporarily, at least, to develop an exaggerated expectation of the possibilities of such arbitration.

Private Agencies

In *The Trading Bank Clerks Case*,[16] I refer to the proved possibilities of private agencies supplementary to, or even independent of, public regulation. For decades there has been much writing and talking about coöperative enterprise. In recent years some extraordinary results have been attained which go to show that theories about coöperation can be put into practical operation. Special reference is made in the judgment cited to the recent book of Mr. Leitch, "Man to Man." In many and varied businesses the claim is made that the application of common-sense methods of business organization, made and carried out by Mr. Leitch in conjunction with employers and employees, achieved the following results: (1) Strikes abolished; (2) output increased from 30 to 300 per cent.; (3) profits larger, wages higher, and employment more secure; (4) labor antagonism and dissatisfaction practically eliminated. Mr. Leitch's methods afford an illustration of the value and possibilities of the self-government of the business unit. As the result of ingenious systems of profit-sharing, of common control and responsibility under wise leadership, employees were given a new interest in their work, and a new sense of power and responsibility. I do not accept the results as proving either that the millennium is at hand, or even that the time has yet arrived when the interests of employers, of employees, or of the general community, can be safely entrusted to "the beneficent operation of private agencies." What some employers have done is no guarantee of

[16] 4 S. A. I. R. 181, 200.

what will be generally done. In the case cited, I dwell at length on the obstacles in the way of industrial betterment along the lines of autonomy of the business unit. These considerations support the conclusion at which I have arrived, after a careful consideration of the present industrial situation, that the next step forward, which is at once practicable and to the advantage of everybody, is to supplement the operation of public regulation of industry, whether by industrial boards or by courts, by the formation of private boards or councils for a particular business concern. So far as private agencies acting alone are concerned, it is only necessary to reflect how the psychological factor stands in the way of social betterment. Many employers may be accused of inertia, of conscious or unconscious go-slowism, of seeking to maintain artificial prices, of exploiting piecework, of undue secrecy as regards profits, and of a traditional class opinion with its reflection in a class organization which easily lends itself to perverse and immoral purposes, seeking to defeat labor rather than coöperate with it. On the other hand, many employees may be accused of impossible idealism, of conscious or unconscious go-slowism, of an obsession as regards high nominal wages, of "direct action," of a desire to get much while giving little, and even of doing everything and anything to make an existing order unworkable, without any clear consciousness of the nature of the new order to be substituted, or the cost to be paid in establishing the new order, or the means of bringing it into operation. Such accusations, and many others, may be made without attempting to apportion the blame as between employers and employees. In any case, they can be made with apparent justice. The fact goes to show at least a provisional need for arbitration, conciliation, or suggestion by public authority. But, if my argument in this article be sound, the near future suggests no prospects of radical improvement unless employers and employees combine to supplement public regulation by an intelligent appreciation of the conditions under which common interests may be promoted. The main obstacle to reform is ignorance. The spirit of autocracy in some, the combative instinct in others, are less serious in the range of influences which play a part than is the misunderstanding of the ways in which a true self-interest may be realized without sacrifice of the common interest.

The Duty of an Industrial Court

In the principal case, I summarize my own views as to the extent to which, and the modes in which, a court of compulsory arbitration may contribute to the solution of the problems of industry. Several conclusions are stated: (1) The social and economic *milieu* conditions the methods of efficient action by an industrial tribunal. (2) Both world and local conditions suggest that the pathway toward industrial betterment in the near future lies in a combination of public and private agencies. (3) An industrial tribunal must not ignore the danger of stifling, by excessive regulation, the free development of private agencies. (4) The terms of an award of an industrial tribunal may be framed so as to give a new incentive to private agencies; for example, by express provision for coöperative councils in the nature of enterprise boards (as distinguished from industrial boards for an industry as a whole), solely constituted of representatives of a particular employer and of employees immediately affected. The more important reasons for this limitation of ambit are that an award provides for an industry as a whole; that what is needed is a supplementing by private agreement of the terms of the award; and that if the parties to such private agreement were to include a large variety of concerns, the net result would probably be the lowest common measure rather than the highest common good, if not, indeed, a conspiracy to exploit the consumer. The chief functions of the coöperative councils would be: (a) To adapt an award made by the court to the special conditions of a particular enterprise; (b) to consider disputes that might arise as to the terms of an award; and (c) to consider and determine upon proposals relative to the conditions of employment not inconsistent with the award. The last mentioned function is by far the most important. It extends to such matters as the best means of increasing efficiency (in respect of quality, output, or services), the terms of any bonus that may be agreed on as supplementary to the award in respect of prices, profits, or output (so as to make the wage earner a dividend sharer), and generally to the discovery and application of means for the expression of that community of interest and responsibility between employer and employee which is far more important in range than those surface

antagonisms which are so apt to obsess the minds of parties in argument before a court.

Here is a clear, definite and practicable policy. It is, however, pertinent to refer to some of the more obvious objections which may be urged against such a process of industrial emancipation, because a judicious combination of public and private agencies is impossible of realization if employers are autocratic or employees destructive. We were once told by an eminent statesman to *think imperially*. In a world of ubiquitous expectancies of evils to come, the need to think imperially may remain. But in any case, we live in an age when we must *think industrially;* and to think industrially means to *think coöperatively*. To this end, it is worth while to refer to objections which just because they are obvious are also dangerous. The objection that such councils as I have suggested could not work has been disproved in many countries, and even in Australia, though they have functioned there to a very limited extent and in imperfect forms. The objection that the councils do not go far enough — the most common objection to nearly all proposed reforms and the most dangerous, because it serves to divide reformers and to render their efforts futile — implies a rejection of a present good on the assumption of the possibility of attaining some other good at a more or less remote future. The objection that the councils may prove disruptive of authority betrays a medieval conception of the meaning of authority, quite incompatible with the trend of modern thought. The objection that the councils may weaken the strength of the trade unions must be viewed in the light of the fact that the trade union exists for the welfare of its members, and in any case would necessarily continue to have most important functions to discharge, not to speak of the new function of protecting sub-groups of its members. The objection that the councils may dethrone "capitalism" has to be viewed in the light of the fact that what the community really needs is more wealth, better distribution of wealth or income, and a more intelligent appreciation of the conditions of producing wealth or income in a modern democratic community. In the present article I can only refer to such objections. They have a common basis in the assumption of the incapacity of man to adapt himself to new conditions of environment. The most obvious and comprehensive answer to such objections as I have stated is, apart from actual

achievement in many countries, that coöperation between employers and employees is not impracticable for the simple reason that it has become necessary.

Though I do not venture to anticipate other than a gradual adoption of such methods of coöperation as I suggest, I must confess to a confidence that the average democratic citizen has intelligence enough to realize that exhibitions of primitive combativeness must end in chastisement, in a world where the operation of international competition, though perhaps qualified by protective tariffs, is an overshadowing influence. If, as I maintain, coöperative enterprise has become a necessity, the recognition of that necessity is a mere matter of time. The sooner and the more general the recognition, the less will be the price paid for emancipation from the ills we now suffer. The immediate difficulty is for men to understand that, while mutual aid is an ancient and approved means for attaining good results, the institutions, the forms of organization, or the modes of expression of mutual aid, are conditioned by circumstances of time and place. If to-day we are to have less fighting and more remuneratively productive work, if we are to have less hostility, hate, suspicion, worry, or fuss, and more efficiency in the complex processes of remunerative production, we must think hard about such means of industrial reorganizations as are immediately possible and of proved efficacy. Two obsessions must be got rid of — one, the obsession of distribution as a sort of end in itself; the other, the obsession of production by methods which cannot command the allegiance of the average citizen of to-day. The emancipation from such obsessions should come at the same time. Failure in the process of emancipation may mean a temporary triumph for employers or employed as the case may be; but such a triumph is likely to be gained at the cost of a grave and perhaps irreparable loss to the community, if not of moral bankruptcy. Extremists in either camp may repudiate such a conclusion. I believe that, so far as Australia is concerned, the average citizen will subscribe to the following: First, that coöperation has become an imperative necessity; second, that coöperation (at any rate for the time being, and in a freedom-loving community with a preference for evolution as distinct from revolution, a tradition in favor of law and order, and an amenability to reason and discussion) is most practicable of realization by a frank and unreserved adoption of the principle of

autonomy or self-determination in the organization of the business enterprise. The forms or degrees of autonomy must vary, not merely in accordance with the infinitely varying conditions of particular enterprises, but also in accordance with the extent to which intelligence and good will predominate. I assume an autonomy not independent of, but supplementary to, the public regulation of the conditions of employment. The compulsory terms of an award should be limited to such minimum conditions of employment as are in the interests of employers and employees throughout the industry. In particular businesses something more, and something far better, is possible. That "something more" depends, as I have just said, upon the extent to which intelligence and good will predominate. Despite all inflammatory talk I must confess to a conviction that the immediate lack is less a good will than an intelligence to find forms for its expression. Notwithstanding the turbulent antagonisms which disturb economic life, I believe that the great body of employers and employees in Australia desire to be fair, and are not unconscious of what I may call the logic of time and circumstance. But the desire and consciousness are thwarted because of a failure to discover or apply the best means for being fair which admit of immediate practical application. In proportion as such means are discovered other means will become apparent. For the present it is enough to say that the day for merely talking about the value of coöperation is past. The time has come for employers and employees to put their cards on the table and to get down to business on right lines. This undoubtedly involves high adventure. To ignore the difficulties would be unpardonably "academic." To suggest that an employer should step down from a pedestal in order to convince employees that he is out for a square deal all round may seem to ask much. But it is not to ask too much of the average employer. Nor, again, is it asking too much of the average employee to distinguish between the practicable and the ideal — between that achievement which is here and now possible, and the vision of some new and better order which may be in time to come. All honor to ideals! They inspire hope, courage, and endurance. They afford an objective. But that objective has always to be brought to the test of practicability in circumstances of time and place. Otherwise we make of our ideals a stumbling-block. There are limits to the extent to which courts, or even

parliaments, can save employees or employers from the natural result of unconscionable folly. Such folly (on the part of either those who call themselves employers or those who call themselves employees) spells revolution — a thing not difficult to start under present conditions of unrest, but always most difficult to stay or direct, and often leading to miserable reaction. Of course there may be a revolution under the form of law. But no revolution of any kind can secure for the people of a modern state a high standard of living without a high standard of well-directed effort both of brain and of muscle. I desire to gloss over no difficulties. I hope I have made it clear that real progress is an uphill business, not a joy-ride. At any rate, so far as the near future is concerned, I have as little hope of an immediate leap to a high standard of living throughout the whole community as I have of a new heaven and a new earth to be born miraculously of a general election. But I do hope for a progressive realization of that form of intelligent conservatism which, while conserving as far as may be possible what is good of the past, is yet responsive to the call for incessant adaptation to the changing conditions of our social and economic life. If this hope is to be justified, the community must succeed in turning to good the results of industrial strife — results which may be good or evil according as we have or have not intelligence and sympathy enough to deal with them.

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